

DHSC, LLC, d/b/a AFFINITY)		
MEDICAL CENTER,)		
)		
and)	Cases	08-CA-090083
)		08-CA-090193
)		08-CA-093035
NATIONAL NURSES ORGANIZING)		08-CA-095833
COMMITTEE (NNOC).)		
)		
)		

National Nurses Organizing Committee (NNOC), the charging party in the above cases, opposes the Motion by Respondent DHSC, LLC, d/b/a Affinity Medical Center for Reconsideration of the Board’s Decision, 362 NLRB No. 78 (April 30, 2015). The Motion for Reconsideration must be denied because Respondent DHSC, LLC, d/b/a Affinity Medical Center (“Affinity”) has failed to establish the requisite “extraordinary circumstances” for a motion for reconsideration of a Board Order under Rule 102.48(d)(1) of the NLRB’s Rules and Regulations (“NLRB Rules”). None of the areas in which Affinity disagreed with the Board’s Order constitutes an “extraordinary circumstance” warranting reconsideration. Nor was Affinity required to file such a motion to preserve its right to challenge the Board’s Order in the United States Court of Appeals, despite Affinity’s claim that it would face a waiver argument if a motion for reconsideration were not filed. Section 102.48(d)(3) of the NLRB Rules expressly provides that a motion for reconsideration need *not* be filed to exhaust administrative remedies.

Given that the alleged fear of facing a waiver argument is highly dubious, the real basis

for the Motion for Reconsideration may well be further delay. Over two and a half years have elapsed since Affinity unlawfully terminated Ann Wayt, one of the leading Union supporters at the Hospital, within a month of the election. Affinity reinstated Ann Wayt only when ordered to do so by a Section 10(j) injunction issued in January 2014 but she has not yet been made whole for the losses caused by her unlawful termination. Nor have the Registered Nurses represented by NNOC been informed that their Employer's many retaliatory acts against the Union and Union supporters have been adjudged "serious and persistent unfair labor practices." They need the assurance that their rights under the National Labor Relations Act will be respected in the future. NNOC urges the Board to give short shrift to Affinity's frivolous motion for reconsideration.

1. The Board's Rejection of Affinity's Affirmative Defense that the NLRB Should Defer to an Alleged Oral Ad Hoc Agreement Supposedly Requiring NNOC to Arbitrate Unfair Labor Practices Hardly Constitutes an "Extraordinary Circumstance" Warranting Reconsideration

Affinity seeks reconsideration because the Board rejected its affirmative defense seeking deferral of the complaint allegations to an arbitrator pursuant to an alleged oral ad hoc agreement conferring upon an arbitrator exclusive jurisdiction over unfair labor practice allegations. The Board rejected the defense on different grounds than the Administrative Law Judge, something the Board clearly has the right to do. The Board reasoned that deferral to arbitration would not be appropriate here because one of the essential preconditions for deferral – that the parties have a long and productive bargaining relationship – could not be satisfied. Affinity seeks a remand to demonstrate, apparently, that it had had a "long and productive bargaining relationship" with NNOC. Adopting the characterization by Judge Harry Edwards of the U.S. Court of Appeals for the District of Colombia Circuit in a case involving the same counsel and a different affiliate of the Community Health Systems, Inc. ("CHS"), this argument "reflects real chutzpah." *Fallbrook*

Hospital Corp. v. NLRB, No. 14-1056 (D.C. Cir. filed May 8, 2015), slip op. at 4. As the Board correctly observed, Affinity’s relationship with NNOC has been neither long nor productive. Within five weeks after NNOC filed its petition for an election and less than a month after the Union won the election, Affinity had issued a written warning, then fired, and then reported to the Ohio Board of Nursing RN Ann Wayt who was known throughout the Hospital as a Union supporter. In that same period, Affinity had unlawfully barred NNOC representative Michelle Mahon from its premises in retaliation for her advocacy on behalf of Wayt. This relationship is arguably even shorter and more fraught with unlawful conduct than the employer-union relationship in *San Juan Bautista Medical Center*, 356 NLRB No. 102 (2011), in which the Board also refused to defer a dispute to arbitration based, inter alia, on the absence of a “long and productive bargaining relationship.”

The Board’s rejection of Affinity’s affirmative defense seeking deferral of the complaint allegations to arbitration based on an alleged oral ad hoc agreement accords with the Board’s treatment of this identical affirmative defense in other cases involving unlawful conduct by CHS affiliates represented by the same counsel as Affinity. *Fallbrook Hospital*, 360 NLRB No. 73, slip op. at 1, fn.2, and 13 (2014), enfd. No. 14-1056 (D.C. Cir. filed May 8, 2015); *Barstow Community Hospital*, 361 NLRB No. 34, slip op. at 1, fn.3 (2104), petition for review pending in No. 14-1167; *Bluefield Regional Medical Center*, 361 NLRB No. 154, (2014). In reasoning adopted by the Board, Judge Laws noted in *Fallbrook Hospital*, “The Board has not extended the *Collyer* line of cases to agreements such as the oral ad hoc...agreement the Respondent attempts to place at issue here...I find the dispute is eminently ill-suited to resolution through arbitration.” 360 NLRB No. 73, slip op. at 13.

The Board correctly rejected Affinity’s argument that its unfair labor practices should be

decided by an Arbitrator; this aspect of the motion for Reconsideration relies upon no extraordinary circumstances and in any event is utterly lacking in merit.¹

2. The Board's Ordering Remedies Beyond Those Ordered by the Administrative Law Judge Did Not Create an "Extraordinary Circumstance" Warranting Reconsideration.

The Board's modifying the ALJ's remedy with respect to the retaliatory reporting of RN Ann Way to the Ohio Board of Nursing is soundly within the Board's discretion. Affinity's reliance upon *Unbelievable, Inc. v. NLRB*, 118 F.3d 795 (1997), is misplaced. *Unbelievable* involved the award of litigation expenses, including attorney's fees, to the charging party and the General Counsel. Both the panel majority and the dissent discussed with approval the Board's authority to order the employer to reimburse *employees* wrongfully sued by their employer for their attorney's fees, pursuant to *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731, 747 (1983). 118 F.3d at 806 (majority) 810-11 (dissent). What the Board has ordered here is analogous to what the Board routinely orders in *Bill Johnson's* cases, with Court approval. Nothing warrants reconsideration of this remedy.

Affinity's contention that the remedy of a Notice reading is punitive and beyond the Board's authority is frivolous. As the Board noted in *United States Service Industries*, 319 NLRB 231, 232 (1995), "the public reading of the notice is an 'effective but moderate way to let in a warming wind of information, and more important, reassurance.'" The Board has ordered its Notice read aloud by a responsible management official (or an NLRB representative in the presence of management) in many cases involving serious and persistent unfair labor practices. See, e.g., *Pacific Beach Hotel*, 361 NLRB No. 65, slip op. at 17, fn.9, and 52 (ALJ); *Pacific*

¹ Affinity's protest of the Board's statement that the filing of any further repetitious non-meritorious affirmative defenses might warrant referral for possible disciplinary proceedings also creates no extraordinary circumstance warranting reconsideration by the Board. Counsel has been the same in the cited cases. Affinity's claim that it risked a waiver argument by failing to file a motion for reconsideration is expressly contrary to Section 102.48(d)(3).

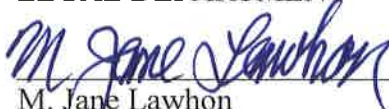
Beach Hotel, 356 NLRB No. 182, slip op. at 7, 36 (ALJ) (2011); *McAllister Towing & Transportation Co.*, 341 NLRB 394, 400 (2004). The Board correctly reasoned that Registered Nurses at Affinity could use a “warming wind of information and reassurance” after the Hospital’s laying waste to their Section 7 rights. This aspect of Affinity’s Motion for Reconsideration should also be denied.

In conclusion, Affinity has failed to bring to the Board’s attention any extraordinary circumstance warranting reconsideration of the Board’s Order. The Motion should promptly be denied.

DATED: June 11, 2015

Respectfully submitted,

NATIONAL NURSES ORGANIZING
COMMITTEE (NNOC)
LEGAL DEPARTMENT

A handwritten signature in blue ink, appearing to read "M. Jane Lawhon", is written over a horizontal line.

M. Jane Lawhon
Counsel for Charging Party, NNOC

PROOF OF SERVICE

The undersigned hereby declares under penalty of perjury that I am a citizen of the United States, over the age of eighteen years, and not a party to the within action; that my business address is 2000 Franklin Street, Oakland, California 94612.

On the date below, I served a true copy of the following document:

CHARGING PARTY'S OPPOSITION TO RESPONDENT'S MOTION FOR RECONSIDERATION

[Cases 08-CA-090083, 08-CA-090193, 08-CA-093035, 08-CA-095833]

via Electronic mail addressed as follows:

Sharlee Cendrosky, Field Attorney
NLRB Region 08
1240 E 9th Street, STE 1695
Cleveland, OH 44199-2086
E-mail: sharlee.cendrosky@nrlb.gov
COUNSEL FOR THE GENERAL COUNSEL

Bryan T. Carmody, Esq.
134 Evergreen Ln.
Glastonbury, CT 06033-3706
E-mail: bryancarmody@bellsouth.net
ATTORNEY FOR RESPONDENT

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

DATED: June 11, 2015



Tym Tschneaux